Supreme Court, U.S.
FILED
95-337 AUG 28 1995
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

KEVIN RICE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

# PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
205 W. Wacker Drive
Chicago, Illinois 60606
(312) 641-0692
Attorney for Petitioner

## (1a) QUESTION PRESENTED

1. Whether defendant's Sixth and Fourteenth Amendment rights to present exculpatory evidence were violated when defendant was prevented from presenting crucial exculpatory evidence, the prior sworn testimony of a witness who was cross-examined by the prosecution at a pre-trial motion to suppress, and hence, the prosecutor had an opportunity and similar motive to cross-examine, because the real factual dispute both at pre-trial motion and at trial was the same: when the police arrived, did co-defendant have the bag of drugs secreted in his pants, or was it in defendant's hands being passed to co-defendant, and where any speculative inability of the prosecution at the motion to suppress,

to demonstrate defendant and co-defendant's relationship as it impacted on co-defendant's credibility, could be demonstrated at trial by introduction of extrinsic evidence.

**(1b) PARTIES INVOLVED [per Rule 21.1(b)]**

Petitioner, Kevin Rice, was the defendant in the Circuit Court of Cook County, appellant in the Appellate Court of Illinois, First Judicial District, and appellee in the Supreme Court of Illinois.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, and appellant in the Supreme Court of Illinois.

## (1c) TABLE OF CONTENTS


| | PAGE |
|---|---|
| Question Presented | i |
| Parties Involved | iii |
| Table of Contents | iv |
| Judgment Below | vii |
| Table of Authorities | viii |
| Judgment and Opinion Below | 2 |
| Jurisdictional Statement | 3 |
| Constitutional Provisions | 4 |
| Statement of the Case | 6 |
| Raising the Federal Question Below | 10 |
| Reason for Granting Certiorari | 11 |

1. Defendant's Sixth and Fourteenth Amendment rights to present exculpatory evidence were violated when defendant was prevented from presenting crucial exculpatory evidence, the prior sworn testimony

PAGE

of a witness who was cross-examined by the prosecution at a pre-trial motion to suppress, and hence, the prosecutor had an opportunity and similar motive to cross-examine, because the real factual dispute both at pre-trial motion and at trial was the same: when the police arrived, did co-defendant have the bag of drugs secreted in his pants, or was it in defendant's hands being passed to co-defendant, and where any speculative inability of the prosecution at the motion to suppress, to demonstrate defendant and co-defendant's relationship as it impacted on co-defendant's credibility, could be demonstrated

PAGE

at trial by introduction of extrinsic evidence. . . . . 11

Conclusion . . . . . 19

Appendices:

A. Illinois Supreme Court Opinion dated April 20, 1995 . . App. 1

B. Illinois Supreme Court Order dated May 30, 1995, denying timely filed (May 11, 1995) Petition for Rehearing . . . . App. 33

C. Illinois Appellate Court Opinion dated May 27, 1993 . . App. 34

**(1d) Judgment Below**

The Opinion of the Supreme Court of Illinois, No. 75689, is attached as Appendix A to this Petition. It is reported at 166 Ill.2d 35, ___ N.E.2d ___, ___ Ill.Dec. ___. (No other citation is presently available.)

## TABLE OF AUTHORITIES

PAGE

### Cases

Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973) . . . 9, 13

Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674 (1986) . . . 16, 17

United States v. Abel, 469 U.S. 45, 83 L.Ed.2d 450 (1984) . . . . . 16

United States v. Baptista-Rodrigues, 17 F.3d 1354 (11 Cir. 1994) . . . . . 17

United States v. Carn, 18 F.3d 738 (9 Cir. 1994) . . . . . 17

United States v. Salerno, 505 U.S ___, 120 L.Ed.2d 255, 112 S.Ct. 2503 (1992) . . . . . 13

Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967) . . . . . 13

### Constitutional Provisions

Fourth Amendment to the United States Constitution . . . . . 4

Sixth Amendment to the United States Constitution . . . . . 4

Fourteenth Amendment to the United States Constitution . . . . . 4-5

PAGE

Statutes and Rules

28 U.S.C. 1257(a) . . . . . 3

Federal Rules of Evidence 804(b)(1) . 13

Supreme Court Rule 10.1 . . . . . 3

Supreme Court Rule 12.1 . . . . . 3

Supreme Court Rule 13.1 . . . . . 3

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1994

---

No.

---

**KEVIN RICE,**

Petitioner,

vs.

**PEOPLE OF THE STATE OF ILLINOIS,**

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS**

---

Petitioner, Kevin Rice, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, affirming the judgment (conviction and sentence) of the Circuit

Court of Cook County, Illinois, Criminal Division.

**Judgment and Opinion Below**

The Opinion of the Illinois Supreme Court is set out as App. A and reported at 166 Ill.2d 35, ___ N.E.2d ___, ___ Ill.Dec. ___.

The Opinion of the Appellate Court of Illinois, First Judicial District, reversing the Circuit Court's judgment, is set out as App. C and reported at 247 Ill.App.3d 415, 617 N.E.2d 360, 187 Ill.Dec. 152.

**Jurisdictional Statement**

On May 27, 1993, the Appellate Court of Illinois, First Judicial District, (App. C) reversed the judgment of the Circuit Court. Petition for Leave to Appeal by the State of Illinois to the Supreme Court of Illinois, No. 75689, was granted on October 6, 1993.

On April 20, 1995, the Illinois Supreme Court (in a 4 to 3 decision) reversed the Illinois Appellate Court. Petition for Rehearing, timely filed on May 11, 1995, was denied on May 30, 1995. (App. B)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. Sec. 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

**Constitutional Provisions**

The Fourth Amendment to the U.S. Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the U.S. Constitution reads:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

"Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."

**STATEMENT OF THE CASE**

On June 13, 1989, defendant, Rice, and one, Pugh, were in a car stopped for a traffic violation. The car which defendant was driving had tinted windows. (Tr. 319) Officer Drozd testified at a pre-trial motion to suppress (and similarly at trial) that notwithstanding the fact that the car had tinted windows, the passenger Pugh rolled down the window, at which time Drozd was able to see defendant Rice pass a paper bag to Pugh, who stuffed it in his pants (Tr. 282, 283) and exited the car. (Tr. 12) The officer then patted Pugh down (Tr. 12), took the bag from Pugh and searched it. (Tr. 13, 15) Heroin was found in the bag.

At a pre-trial motion to suppress

hearing, Pugh, Rice's co-defendant, testified that the bag containing contraband was in his (Pugh's) possession, in his underpants, for some two hours before police seized it. (Tr. 26-31) He denied it was handed to him by defendant.

Defendant Rice testified the police stopped the car, and he was ordered to get out of the car. (Tr. 37) He testified that Officers Cronin and Drozd had previously stopped him frequently, at random. (Tr. 39) He denied handing the bag to Pugh.

The trial court denied defendant's motion to suppress, and also denied defendant's motion for a severance.

At trial, the officer who testified at the motion hearing, again testified

that he saw the co-defendant, Pugh, obtain the bag containing contraband from defendant, then place it in his pants.

Pugh, himself on trial, invoked his Fifth Amendment privilege against self-incrimination. Defendant moved to admit Pugh's prior sworn testimony because Pugh was legally unavailable. The trial court denied defendant's right to present at trial, in order to contradict the officer, the aforesaid co-defendant Pugh's testimony at the motion to suppress hearing.

On appeal, defendant asserted (among other issues), as he had in the trial court, that he was denied his Sixth and Fourteenth Amendment rights to present exculpatory evidence when the trial

court excluded the prior testimony of his co-defendant, given under oath at a motion to suppress hearing, where the same factual issue existed both at the motion and at trial, where, at the prior hearing, the State had ample opportunity to cross-examine, and did cross-examine Pugh, where such testimony exculpated defendant.

The Illinois Appellate Court reversed, holding that under Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), co-defendant's statement should have been admitted. (App. 39) The State proceeded to the Illinois Supreme Court, which reversed the Appellate Court, thus reinstating defendant's conviction and sentence.

**RAISING THE FEDERAL QUESTION BELOW**

In the trial court, both during trial and in post-trial motions, defendant asserted that under the Sixth and Fourteenth Amendments to the United States Constitution, he had a right to present co-defendant's prior sworn testimony as exculpatory evidence. He again presented this issue to the Illinois Appellate and Supreme Courts. All three courts considered this issue.

## REASON FOR GRANTING CERTIORARI

1.

**Defendant's Sixth and Fourteenth Amendment rights to present exculpatory evidence were violated when defendant was prevented from presenting crucial exculpatory evidence, the prior sworn testimony of a witness who was cross-examined by the prosecution at a pre-trial motion to suppress, and hence, the prosecutor had an opportunity and similar motive to cross-examine, because the real factual dispute both at pre-trial motion and at trial was the same: when the police arrived, did co-defendant have the bag of drugs secreted in his pants, or was it in defendant's hands being passed to co-defendant, and where any speculative inability of the prosecution at the motion to suppress, to demonstrate defendant and co-defendant's relationship as it impacted on co-defendant's credibility, could be demonstrated at trial by introduction of extrinsic evidence.**

Four Justices of the Illinois Supreme Court, in a 4 to 3 opinion, held that defendant could not present co-defendant's prior sworn testimony at a

motion to suppress hearing, where the prosecutor had an opportunity to and did cross-examine, because:

> "The focus of the cross-examination of codefendant at the suppression hearing ... was the conduct of codefendant just prior to the search, his self-interest in testifying falsely at the suppression hearing,... At trial however, the State's focus would be on the guilt or innocence of defendant--a much different issue than that presented at the suppression hearing--and any motive codefendant[1] might have in making exculpatory statements on behalf of defendant." (App. 14-15)

Hence, the majority concluded:

> "The issues at the suppression hearing and the purpose for which codefendant's testimony was

---

[1]The court had reference to the witness and defendant allegedly being members in the same gang.

> later offered at defendant's trial are not so similar that we may say that the State had a meaningful opportunity to effectively cross-examine codefendant on the occasion his testimony was given." (App. 15)

This ruling is in conflict with opinions of this Court, upholding a defendant's due process right to present exculpatory evidence in support of his defense, Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967); and dicta in United States v. Salerno, 505 U.S ___, 120 L.Ed.2d 255, 112 S.Ct. 2503 (1992),[2]

---

[2]In Salerno, this Court interpreted an analogous situation as regulated by Federal Rules of Evidence 804(b)(1). This Court did not decide the constitutional question herein presented.

that defendant's constitutional right to present evidence is denied when at the prior hearing, the testimony was given under circumstances where the prosecutor had opportunity and similar motive to cross-examine.

The Illinois Supreme Court Opinion is wrong because here, (1) the excluded evidence is very exculpatory; (2) at the motion to suppress hearing, the prosecutor had a similar motive to discredit the witness's statement and credibility, and (3) any slight lack of ability to discredit the co-defendant can be alleviated by presenting extrinsic evidence to the jury of the relationship between defendant and co-defendant.

The co-defendant's excluded testimony

that he had the bag secreted in his pants long before the police arrived, i.e., defendant did not hand it to co-defendant when the police officer arrived, is very exculpatory. (App. 39) It directly contradicts the officer's testimony that he saw defendant handing the bag to co-defendant.

The prosecution had a meaningful opportunity to, and did, cross-examine on the real factual issue: where was the bag when the police arrived? (App. 14) At the motion to suppress hearing, the prosecution could have tried to demonstrate the co-defendant's interest and bias.

Furthermore, the prosecution's right to demonstrate the co-defendant's interest and bias was not diminished,

because at trial, as at sentencing, the prosecution was able to present extrinsic evidence as to the relationship between defendant and co-defendant. It is not uncommon for such evidence to be presented, not by cross-examination of defendant and co-defendant, but by means of extrinsic evidence. See, for example, United States v. Abel, 469 U.S. 45, 83 L.Ed.2d 450 (1984) (bias and interest can be shown by membership of defendant and witness in same gang).

Here, because the prosecution was able to advise the jury of the nature, character and credibility of the witness (cf. Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674 (1986)), the difference between cross-examination at

a motion to suppress and at a trial does not mean that the prosecution did not have "similar motive and opportunity."

Furthermore, just as a limitation of a defendant's right to cross-examine a witness on interest and bias does not substantially negate his right to a fair trial, "as long as the jury receives sufficient information to appraise the bias and motivation of the witness," Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674 (1986); accord, United States v. Carn, 18 F.3d 738 (9 Cir. 1994); United States v. Baptista-Rodrigues, 17 F.3d 1354 (11 Cir. 1994), so too, defendant's right to present exculpatory evidence must be superior to any slight limitation on a prosecutor's right to cross-examine witnesses--a

right not as broad as defendant's right of confrontation--where any limitation can be cured by the prosecutor's ability to present extrinsic evidence of interest and bias, and where the prosecutor had a meaningful right to cross-examine on the real factual dispute.

Here, where there existed a real opportunity for the prosecution to present evidence to demonstrate co-defendant's motive to testify as he did, and the prosecution did have a similar motive and opportunity to cross-examine the co-defendant at the motion to suppress on the real issue in dispute, and where excluding the co-defendant's testimony deprives the defendant of the **only** means he has to present exculpatory

evidence--the co-defendant's admission that he [and not defendant] possessed the bag long before the police arrived--exclusion of this exonerative defense evidence violates defendant's constitutional rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

**CONCLUSION**

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

# APPENDICES

**APPENDIX A**

FILED
APR 20 1995
SUPREME COURT CLERK

SUPREME COURT OF ILLINOIS

Docket No. 75689--Agenda 7--May 1994.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. KEVIN RICE, Appellee.

JUSTICE MILLER delivered the opinion of the court:

Following a jury trial in the circuit court of Cook County, defendant, Kevin Rice, was convicted of possession of a controlled substance with intent to deliver (Ill. Rev. Stat. 1985, ch. 56½, par. 1401(a)(1)). He was subsequently sentenced to 20 years' imprisonment. The appellate court reversed defendant's conviction, finding that the trial court erred in refusing to admit into evidence

a codefendant's exculpatory testimony made at a pretrial suppression hearing. (247 Ill. App. 3d 415.) We allowed the State's petition for leave to appeal (145 Ill. 2d R. 315(a)) and now reverse the judgment of the appellate court.

Facts

The following evidence was adduced at the joint trial of defendant and codefendant, Raymond Pugh. On June 13, 1989, at 8:30 p.m., Chicago police officers Robert Drozd and Michael Cronin were driving in an unmarked police car northbound on Sacramento Avenue in Chicago. The officers were accompanied by Pat Law, an investigator from the Cook County State's Attorney's office. A Nissan vehicle with tinted windows subsequently passed the unmarked police

car. Officer Drozd testified that he believed the vehicle was traveling about 40 miles per hour in a 30-mile-per-hour zone.

The officers followed the vehicle through the intersection of Sacramento Avenue and Madison Street. Officer Cronin then motioned for the driver of the Nissan to pull over. After the driver complied, both officers exited the police car. Officer Drozd approached the passenger side of the Nissan vehicle, while Officer Cronin approached the driver's side.

Officer Drozd testified that the passenger window was rolled down. As he approached the vehicle, Officer Drozd, through the open passenger window, observed defendant, the driver of the

vehicle, hand codefendant a brown paper bag, which codefendant tucked inside his pants. Codefendant, who was seated in the passenger seat, then exited the vehicle. Believing the bag to contain a weapon, Officer Drozd conducted a patdown search of codefendant and recovered the bag from codefendant's pants. The bag contained a white, chunky substance, later identified as approximately 103 grams of heroin. Officer Drozd then placed codefendant under arrest.

While the preceding events were occurring, Officer Cronin was with defendant, who had stepped out of the car on the driver's side. Officer Drozd informed Officer Cronin that he had observed defendant hand the paper bag to

codefendant. Officer Cronin then placed defendant under arrest.

After the State rested its case, defendant's counsel attempted to call codefendant as a witness. Codefendant invoked his fifth amendment privilege against self-incrimination and refused to testify. (U.S. Const., amend. V; see also Ill. Const. 1970, art. I, §10.) Prior to trial, however, codefendant had testified in a hearing on a motion filed on his behalf to quash arrest and suppress evidence. During the hearing on his suppression motion, codefendant testified that he had placed the paper bag containing the contraband inside his pants about two hours before the police stopped the car. Because codefendant asserted his fifth amendment right to

refuse to testify at trial, defense counsel moved to admit into evidence the testimony given by codefendant at the suppression hearing that was exculpatory of defendant. The trial judge ruled that the testimony was inadmissible because the issues at the suppression hearing and at trial were not similar enough to assure that the State had a meaningful opportunity to cross-examine codefendant at the time the testimony was given. Defendant was subsequently convicted of possession of a controlled substance with intent to deliver and was sentenced to a 20-year prison term.

On appeal to the appellate court, defendant argued, among other things, that the trial judge erred in refusing to admit codefendant's suppression

hearing testimony. The appellate court agreed, finding that codefendant's testimony was properly admissible under Federal Rule of Evidence 804(b)(3), the statement-against-interest exception to the hearsay rule. Accordingly, the appellate court reversed defendant's conviction and remanded the cause for a new trial. (247 Ill. App. 3d at 417-19.) We allowed the State's petition for leave to appeal (145 Ill. 2d R. 315(a)) and, for the reasons that follow, reverse the judgment of the appellate court.

Discussion

Before this court, the State initially contends that the appellate court improperly adopted Rule 804(b)(3). It further argues that the appellate

court erred in finding codefendant's suppression hearing testimony admissible. Specifically, the State contends that codefendant's suppression hearing testimony is inadmissible hearsay and does not fall within the statement-against-interest or the former-testimony exception to the hearsay rule, the two exceptions advanced by defendant in urging the trial court's admission of the testimony.

We first consider the State's argument that codefendant's suppression hearing testimony is not admissible under the former-testimony exception to the hearsay rule. It is well settled that the testimony of a witness at a prior hearing is admissible in evidence

at trial where the witness is unavailable and when ample opportunity to cross-examine existed at the prior hearing. (People v. Horton (1976), 65 Ill. 2d 413, 416; People v. Tennant (1976), 65 Ill. 2d 401, 411.) It is the second element which serves as the focal point of the dispute in this case. As this court has stated, determining whether ample opportunity to cross-examine at the prior hearing exists does not lend itself to a per se determination, but must be decided on the circumstances of each case. See Horton, 65 Ill. 2d at 417.

In applying the former testimony exception to testimony elicited at a preliminary hearing, this court has recognized the distinction between the

opportunity to cross-examine afforded at trial and at a preliminary hearing. "'A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.'" (Horton, 65 Ill. 2d at 416, quoting Barber v. Page (1968), 390 U.S. 719, 725, 20 L. Ed. 2d 255, 260, 88 S. Ct. 1318, 1322; see also People ex rel. Daley v. Moran (1983), 94 Ill. 2d 41, 48.) Cross-examination at a preliminary hearing is subject to the general rule that questioning may not extend beyond the scope of the direct examination and such further interrogation as necessary to show interest, bias, prejudice, or

motive of the witness, to the extent that these factors are relevant to the question of probable cause. Horton, 65 Ill. 2d at 416-17.

In view of the limited nature of the evidence that may be introduced at a preliminary hearing, this court has stated that whether adequate opportunity to cross-examine existed at a preliminary hearing "may not depend in its entirety on what transpired at that hearing." (Horton, 65 Ill. 2d at 417.) "Adequate opportunity to cross-examine means an opportunity to effectively cross-examine ***." (Horton, 65 Ill. 2d at 417.) Merely providing some opportunity to cross-examine at a preliminary hearing does not necessarily establish that the party had an adequate

opportunity. (Horton, 65 Ill. 2d at 417.) Because a suppression hearing is even more limited in focus than a preliminary hearing, the reasoning in Horton is equally applicable to the present case.

At the outset, we note that there is no dispute that the State had an opportunity to cross-examine codefendant at the suppression hearing. The key question is whether that opportunity provided a means to effectively cross-examine codefendant. The State argues that it did not have an opportunity to effectively cross-examine codefendant at the suppression hearing because it did not have the motive to question codefendant regarding the nature of his relationship with defendant, which might

have prompted codefendant to testify falsely. The State further contends that had codefendant testified at trial it would have inquired into the existence of such a relationship. Because of the limited nature of the suppression hearing and the State's limited focus at the proceeding, we agree that the State did not have an adequate opportunity to effectively cross-examine codefendant. Without such an opportunity, codefendant's testimony at the suppression hearing was properly denied admission under the former-testimony exception to the hearsay rule.

For an opportunity to cross-examine to be considered meaningful, and therefore adequate and effective, the motive and focus of the cross-

examination at the time of the initial proceeding must be the same or similar to that which guides the cross-examination during the subsequent proceeding. (Cf. Fed. R. Evid. 804(b)(1).) In the present case, the question presented at codefendant's suppression hearing dealt with whether Officer Drozd saw codefendant tuck a brown paper bag into his pants after defendant's car was stopped, giving the officer probable cause to search codefendant. The focus of the cross-examination of codefendant at the suppression hearing therefore was the conduct of codefendant just prior to the search, his self-interest in testifying falsely at the suppression hearing, and the issues presented by the motion to

suppress. At trial however, the State's focus would be on the guilt or innocence of defendant--a much different issue than that presented at the suppression hearing--and any motive codefendant might have in making exculpatory statements on behalf of defendant. The issues at the suppression hearing and the purpose for which codefendant's testimony was later offered at defendant's trial are not so similar that we may say that the State had a meaningful opportunity to effectively cross-examine codefendant on the occasion his testimony was given. (Cf. United States v. Wingate (2d Cir. 1975), 520 F.2d 309, 316; see also United States v. Miller (D.C. Cir. 1990), 904 F.2d 65, 68; 2 J. Strong, McCormick on

Evidence §304, at 315 (4th ed. 1992) ("similar motive" requires, "[a]t most, the issue on which the testimony was offered in the first [proceeding] must be the same as the issue upon which it is offered in the second"); 5 J. Wigmore, Evidence §1387, at 91 (Chadbourn rev. ed. 1974) ("The issue on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested for cross-examination upon the point now in issue" (emphasis omitted)).) As previously noted, without such an opportunity, codefendant's testimony could not be admitted under the former-testimony exception.

We also reject the argument that codefendant's suppression hearing testimony was admissible under the statement-against-penal-interest exception to the hearsay rule. As to this issue, the State initially contends that the appellate court improperly adopted Rule 804(b)(3). Rule 804(b)(3) permits the admission of:

> "A statement which was at the time of its making *** so far tended to subject the declarant to civil or criminal liability, *** that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." (Fed. R. Evid. 804(b)(3).)

The State maintains that this court, in determining the admissibility of declarations against penal interest, has specifically chosen not to adopt this rule. Rather, the State contends that this court has adopted the "objective indicia of trustworthiness" analysis employed in Chambers v. Mississippi (1973), 410 U.S. 284, 300-01, 35 L. Ed. 2d 297, 311-12, 93 S. Ct. 1038, 1048-49, and used most recently by this court in analyzing a similar issue in People v. Cruz (1994), 162 Ill. 2d 314, 342-47. (See also People v. House (1990), 141 Ill.2d 323, 389-90; People v. Sanchez (1989), 131 Ill. 2d 417, 423-24.) Because we find that codefendant's suppression hearing testimony would be inadmissible under either Chambers or

Rule 804(b)(3), we need not address the State's initial argument that the appellate court erroneously adopted the rule.

To reach this conclusion, we first examine the requirements for admission of a statement against penal interest under Rule 804(b)(3) and Chambers. Rule 804(b)(3) requires that three conditions be met before a statement will be admitted under this rule: (1) the declarant must be unavailable, (2) the declarant's statement must have been against penal interest, and (3) corroborating circumstances support the trustworthiness of the statement. (See United States v. Garcia (7th Cir. 1993), 986 F.2d 1135, 1139.) As to the latter requirement, neither Rule 804(b)(3) nor

the notes accompanying the rule elaborate on what constitutes "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement." (Fed. R. Evid. 804(b)(3).) The advisory notes do indicate, however, that "[t]he requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication," thus ensuring the statement's reliability. See Fed. R. Evid. 804(b)(3), Advisory Committee's Note.

Under Chambers, the statement at issue must be against the declarant's interest, and the statement must be accompanied by sufficient indicia of reliability to be admitted. (See People v. Cruz (1994), 162 Ill. 2d 314, 342-

47.) Chambers does not specify the indicia of reliability that must be present in order for a statement to be admitted. See People v. Bowel (1986), 111 Ill. 2d 58, 67.

Although the parties dispute whether codefendant's statement was against his penal interest, we can assume for purposes of this opinion that codefendant's statement was against his penal interest and, for a Rule 804(b)(3) analysis, that codefendant was also unavailable, having asserted his fifth amendment right not to testify. We therefore need only discuss the requirement under Rule 804(b)(3) and Chambers that in order for the statement to be admissible sufficient circumstances exist to demonstrate the

trustworthiness of the testimony given by codefendant at the hearing on his motion to suppress.

Defendant maintains that codefendant's suppression hearing testimony was trustworthy because it was against codefendant's penal interest, was under oath, and was subject to cross-examination. As previously explained, however, the focus and purpose of the State's cross-examination of codefendant at the suppression hearing was limited, and thus the State was not able to fully test the testimony's reliability. It therefore cannot be said that the fact codefendant was subject to cross-examination assures the testimony's reliability. 5 J. Wigmore, Evidence §1387, at 90

(Chadbourn rev. ed. 1974) ("Unless the issues were then the same as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods" (emphasis in original)).

Moreover, the absence of several other factors further supports our conclusion that codefendant's testimony was not sufficiently trustworthy to be admitted. Codefendant's testimony was not a spontaneous statement to a close acquaintance, as suggested by Chambers, but was elicited through questioning at the pretrial motion to suppress, held approximately 22 months after the

seizure at issue. Further, we note that codefendant had a motive to testify falsely. Codefendant stood to benefit at the suppression hearing by making the statement in question because, if his testimony had been believed, his motion would have been granted and the evidence against him suppressed. Additionally, codefendant's statement that he placed the bag in his pants two hours prior to being stopped was not corroborated by any other evidence. Because we believe that there was insufficient indicia of reliability of codefendant's testimony at the suppression hearing, we find it inadmissible at trial under either Chambers or Rule 804(b)(3).

Conclusion

For the foregoing reasons, we find

that the trial court did not abuse its discretion in excluding at trial codefendant's suppression hearing testimony. Accordingly, the judgment of the appellate court is reversed. Because of its ruling on the admissibility of codefendant's testimony, the appellate court did not address additional arguments raised by defendant. We therefore remand the cause to the appellate court for consideration of the remaining issues.

*Appellate court reversed; cause remanded.*

JUSTICE HARRISON, dissenting:

I agree with the appellate court that the admission made by Pugh at the suppression hearing was admissible at trial. Generally, a third party's extrajudicial declarations, not made

under oath, that he committed a crime are purely hearsay and are inadmissible, even though they are declarations against interest. (People v. Tate (1981), 87 Ill. 2d 134, 143.) When justice requires, however, such extrajudicial declarations may be admissible under the statement-against-penal-interest exception to the hearsay rule if there are sufficient indicia of trustworthiness. (People v. Bowel (1986), 111 Ill. 2d 58, 66.) The United States Supreme Court so recognized in Chambers v. Mississippi (1973), 410 U.S. 284, 302, 35 L. Ed. 2d 297, 313, 93 S. Ct. 1038, 1049.

Under Chambers, the availability of a witness is not an essential element in determining the admissibility of a

statement against interest. (See also People v. Morris (1986), 148 Ill. App. 3d 471; M. Graham, Cleary & Graham's Handbook of Illinois Evidence §804.7, at 783 (6th ed. 1994).) The critical inquiry is whether the statement was made under circumstances that ensure its trustworthiness. In Chambers, there were sufficient indicia of trustworthiness in that (1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred, (2) the statement was corroborated by other evidence, (3) the statement was self-incriminating and against the declarant's interest, and (4) there was an adequate opportunity for cross-examination of the declarant. (Chambers, 410 U.S. at 300-01, 35 L. Ed.

2d at 312, 93 S. Ct. at 1048-49.) We have held, however, that these four indicia are not requirements of admissibility. Accordingly, they need not all be present in order for a declaration to be admissible. The question to be considered in judging the admissibility of a declaration is simply whether the declaration was made under circumstances that provide "considerable assurance" of its reliability by objective indicia of trustworthiness. Bowel, 111 Ill. 2d at 67.

Two of the factors enumerated in Chambers are present here. In Chambers, the Supreme Court found that certain confessions were against the declarant's penal interest where they were, "in a very real sense self-incriminatory and

unquestionably against interest." (Chambers, 410 U.S. at 301, 35 L. Ed. 2d at 312, 93 S. Ct. at 1048.) Pugh's declaration that he possessed heroin for two hours was both self-incriminating and against his interest. No credible argument could be made that making that declaration was not against his penal interest. See People v. Kokoraleis (1986), 149 Ill. App. 3d 1000.

The second factor present here is the State's opportunity to cross-examine Pugh. This court held in People v. Horton (1976), 65 Ill.2d 413, 416, that an ample opportunity to cross-examine must be decided upon by the circumstances in each case. I disagree with the majority's conclusion that the State's opportunity was not adequate in

the case at bar. Pugh was in court under oath, and the State plainly had every chance to question Pugh regarding whether he possessed the heroin in his pants for two hours or, alternatively, whether defendant Rice handed it to him as Officer Drozd approached their automobile.

The State protests that it would have liked to question Pugh regarding the additional issue of his relationship with the defendant, but had no motive to do so at the suppression hearing. I find this contention unpersuasive. Considering the facts of the crime--Pugh and defendant were arrested while driving around together--and the nature of Pugh's admission, I believe that the State had every reason to pursue the

matter further in order to ascertain why Pugh acted as he did.

An additional indicium of reliability to provide "considerable assurance" of trustworthiness in this case is the fact that the statement was made in a courtroom under oath. These circumstances distinguish this case from the court's decisions in People v. Bowel and People v. Tate which applied the same analysis to declarations against penal interest. In neither of those cases were the declarations at issue made under oath or made in a courtroom, as they were here. The codefendant's testimony in this case was sufficiently trustworthy, and the trial court should not have prevented the jury from hearing it.

Although the admission of evidence is within the sound discretion of the trial court and the court's ruling should not be reversed absent a clear showing of abuse of that discretion (Bowel, 111 Ill. 2d at 68), I believe that such an abuse occurred in this case. Defendant was denied a fair trial and is entitled to be tried again. I would therefore affirm the judgment of the appellate court.

CHIEF JUSTICE BILANDIC and JUSTICE McMORROW join in this dissent.

**APPENDIX B**

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

May 30, 1995

Mr. Frederick F. Cohn
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IL 60606

No. 75689 - People State of Illinois, appellant, v. Kevin Rice, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 9, 1995.

**APPENDIX C**

FOURTH DIVISION
FILED: 05/27/93

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

ILLINOIS APPELLATE COURT
FIRST DISTRICT

No. 1-92-1308

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| Plaintiff-Appellee, | ) | |
| v. | ) | |
| KEVIN RICE, | ) | HONORABLE DANIEL J. KELLEY, |
| Defendant-Appellant. | ) | PRESIDING. |

JUSTICE JOHNSON delivered the opinion of the court:

After a jury trial in the circuit court of Cook County, defendant, Kevin

Rice, was convicted of possession of a controlled substance with intent to deliver (Ill. Rev. Stat. 1985, ch. 56½, par. 1401(a)(1)) and was sentenced to a 20-year term in the Illinois Department of Corrections.

On appeal, defendant contends (1) the trial court erred in disallowing the testimony of codefendant given under oath at the motion to suppress hearing prior to trial; (2) the trial court erroneously instructed the jury that if it found sufficient evidence to convict either defendant, it should convict both defendants; (3) the evidence was seized in violation of the fourth amendment and the due process clause of the fourteenth amendment; (4) the trial court failed to instruct the jury on the relevant law;

(5) the trial court erroneously denied a severance of his trial from that of where their defenses were antagonistic; and (6) the evidence was insufficient to sustain a conviction of possession with intent.

We reverse and remand.

The following pertinent facts were adduced at trial. On June 13, 1989, Chicago police officers Robert Drozd and Michael Cronin observed defendant and codefendant traveling north on Sacramento Avenue. Officer Cronin determined that the car was going 40 miles per hour in a 30-mile-per-hour zone and the officers proceeded to follow it. Officer Drozd motioned for defendant to pull over and he complied.

Officer Drozd got out of the car

and approached defendant's vehicle. Through the open window, the officer saw defendant hand codefendant, who was in the passenger seat, a brown bag which codefendant placed in his waistband area. Codefendant then exited the car and Officer Drozd patted-down the area where codefendant placed the brown bag, believing it to be a gun. Officer Drozd removed the bag from codefendant, unwrapped it and saw that it contained a hard rock, white, substance he recognized to be a narcotic. Lab tests performed later determined the substance to be heroin. Officer Drozd placed codefendant under arrest.

Contemporaneously, Officer Cronin was talking to defendant who had also stepped out of the car. Officer Drozd

informed Officer Cronin that he observed defendant pass the bag containing the substance to codefendant, and defendant was placed under arrest.

Prior to trial, a suppression of evidence hearing was conducted. Codefendant testified that he placed the brown bag in his underpants about 2 hours before the police pulled him and defendant over. At trial, defense counsel moved to admit this testimony into evidence because codefendant indicated his desire to invoke his fifth amendment privilege against self-incrimination at trial. The trial judge ruled that codefendant's testimony would not be admitted at trial.

Defendant was found guilty of possession of a controlled substance

with intent to deliver and was sentenced to 20 years in the Illinois Department of Corrections. He appeals.

Initially, on appeal, defendant posits that the trial court erroneously failed to admit codefendant's exculpatory testimony given at the motion to suppress hearing. We agree.

Codefendant's testimony was properly admissible under the statement against interest exception to the hearsay rule (Fed. R. Evid. 804(b)(3)), which requires the declarant to be unavailable as a witness. The rule states:

> "A statement which was at the time of its making *** so far tended to subject him [the declarant] to civil or criminal liability, *** that a reasonable man in his position would not have made the statement unless he believed

> it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

In United States v. Garcia (7th Cir. February 24, 1993), No. 91-3094, the court outlined a test used to determine whether a statement falls within the confines of Rule 804(b)(3). Admission is predicated on the satisfaction of the following prongs: (1) the declarant must have been unavailable to testify, (2) the declarant's statements must have been against his penal interest, and (3) corroborating circumstances must support the trustworthiness of the statement. Garcia, slip. op. at 7-8; see United

States v. Garcia (7th Cir. 1990), 897 F.2d 1413.

Our evaluation of the first prong of the Garcia test demonstrates, contrary to the State's assertions, that the declarant was indeed unavailable. Codefendant's utilization of his fifth amendment privilege against self-incrimination constitutes a refusal to testify encompassed within the requisite unavailability part of the test. (Garcia, slip. op. at 8.) The State argues that codefendant was not unavailable for purposes of Rule 804(b)(3) because his unavailability was not attributable to a physical condition. The unavailability aspect of the rule, however, is not so rigid.

The second prong of the Garcia

test, the statements must have been against the declarant's penal interest, also fails to merit lengthy analytical discussion. The advisory committee notes pertaining to Rule 804(b)(3) state in part: "Whether a statement is *** against penal interest must be determined from the circumstances of each case." (Fed. R. Evid. 804(b)(3), advisory committee notes.) Codefendant testified that he solely possessed the bag containing the heroin and that defendant did not hand it to him as Officer Drozd contended. This statement subjected codefendant to criminal liability and was accordingly contrary to his penal interest.

Examination of the third part of the Garcia test, the presence of

corroborating circumstances sufficiently indicative of the statement's trustworthiness, is less facile.

Neither Rule 804(b)(3) nor the associated notes specifically delineate what constitutes corroborating circumstances. "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication," thus ensuring the trustworthiness of the statement. (Fed. R. Evid. 804(b)(3), advisory committee notes.) In accordance with the spirit of the rule, we will consider several factors promoting reliability which may constitute corroborating circumstances.

First, we do not believe that codefendant had a motive to fabricate.

The record fails to evince a close relationship between defendant and codefendant which would increase the likelihood of fabrication to protect a friend. Second, codefendant's statements do not contain inconsistencies reflecting unfavorably on his veracity. Third, there is no evidence that codefendant was coerced into making the statement exonerating defendant. Fourth, there is also no evidence that the statement was made in order to curry favor with authorities.

Supplemental to the aforementioned factors indicative of trustworthiness, we will consider a widely interpreted and utilized standard promulgated by the Supreme Court of the United States for the express purpose of analyzing

reliability of a declaration against penal interest. Chambers v. Mississippi (1973), 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038, formulated four factors which provide a declaration against penal interest with some indicia of trustworthiness: (1) the statement was made to a close acquaintance shortly following the crime; (2) the statement was corroborated by other evidence; (3) the statement was against the declarant's interest and self-incriminatory; and (4) the declarant was subjected to sufficient cross-examination. Chambers, 410 U.S. at 300-01, 35 L. Ed. 2d at 311-12, 93 S. Ct. at 1048-49.

This court has precedingly used these factors mechanistically as

preconditions for admissibility. (See People v. Powell (1985), 139 Ill. App. 3d 701; People v. Newell (1985), 135 Ill. App. 3d 417; People v. Bracey (1981), 93 Ill. App. 3d 864.) This, however, is no longer the correct approach in Illinois. Our supreme court has stated: "The four factors which the court enumerated in Chambers *** are to be regarded simply as indicia of trustworthiness and not as requirements of admissibility." People v. Bowel (1986), 111 Ill. 2d 58, 67.

Furthermore, we acknowledge, as did the court in Bowel, that Rule 804(b)(3) was developed subsequent to Chambers and had the Chambers factors been intended as threshold for admissibility, they would have been included in the Rule.

(Bowel, 111 Ill.2d at 68.) Instead, the Rule does not contain corroborating circumstances that must be satisfied in order to properly admit a declaration against penal interest. Therefore, we use the Chambers factors only as considerations, not as prerequisites in the ultimate determination of admissibility.

Here, codefendant's testimony satisfies three of the four Chambers factors. As previously discussed, codefendant's statement was corroborated by other evidence and it was against his penal interest. Codefendant was also exposed to cross-examination by the State at the suppression of evidence hearing. The unfulfillment of the initial prong of the Chambers test does

not bear adversely upon the overall reliability of the statement.

Although seemingly mindful of Bowel's interpretation of Chambers, the State incongruously urges us to accept the assertion that because codefendant's testimony fails to satisfy all of the Chambers factors, it is automatically inadmissible. In view of the foregoing, this position is without merit.

"The *** [trial] court must find only that sufficient corroborating circumstances exist and then permit the jury to make the ultimate determination concerning the truth of the statements." (United States v. Garcia (7th Cir. February 24, 1993), No. 91-3094, slip. op. at 10-11.) We find that codefendant's testimony was sufficiently

trustworthy and that the trial court erroneously failed to allow the jury to consider it.

We are unpersuaded by the State's argument that this exclusion is harmless error. The State opines that due to the overwhelming evidence of defendant's guilt and due to the trial court's finding that codefendant's testimony lacked credibility, the verdict was unaffected by the exclusion of the testimony. We believe that, had codefendant's testimony exonerating defendant been admitted, the outcome might have been different.

In light of the above determination, a review of defendant's additional contentions is superfluous.

For the foregoing reasons, the

judgment of the circuit court of Cook County is reversed and this cause is remanded to the trial court for a new trial.

Reversed and remanded.

HOFFMAN and CAHILL, JJ., concur.